Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

MARK K. SACHS,
Respondent.

On Petition For a Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the same questions presented in the pending case of State of Florida v. Gabriel Harden, et al., No. 06-770. The questions are:

1. Whether persons who receive remuneration for providing services or referrals for which payment is not made under Medicaid fall within the federal employee safe harbor provision.

2. Whether the anti-kickback provision of Florida's Medicaid fraud statute is preempted by the federal anti-kickback statute.

LIST OF PARTIES

The petitioner is the State of Florida.

Respondent is Mark K. Sachs.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Florida hereby petitions for a writ of certiorari to review the decision of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court, dated January 18, 2007, and reported at 948 So. 2d 723 (Fla. 2007), is set forth in Appendix A, pp. 1a-2a. The decision of the District Court of Appeal of Florida, Third District, reported at 926 So. 2d 440 (Fla. Dist. Ct. App. 2006), is set forth in Appendix B, p. 3a. The order of the Eleventh Judicial Circuit Court is set forth in Appendix C, pp. 4a-5a.

JURISDICTIONAL STATEMENT

The decision of the Florida Supreme Court was entered on January 18, 2007. The time in which a motion for rehearing or clarification may be filed elapsed on February 2, 2007, during which time no motion was filed. See Fla. R. App. P. 9.330(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes, constitutional provisions, and federal regulations, the pertinent portions of which are set forth in Appendices F-1:

1. Article VI, clause 2 of the United States Constitution. App. 22a.

2. 42 U.S.C. § 1320a-7b. App. 23a-24a.

3. § 409.920, Fla. Stat. (2000). App. 25a-26a.

4. 42 C.F.R. § 1001.952. App. 27a.

STATEMENT OF THE CASE

This petition presents the same issue presented in the pending case of State of Florida v. Gabriel Harden, et al., No. 06-770: whether the anti-kickback provision of Florida's Medicaid fraud statute is preempted by the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2). The federal statute makes it unlawful to "knowingly and willfully" pay or receive remuneration for furnishing an item or service for which payment may be made under the Medicaid program.

Under the Florida anti-kickback statute in effect in 2000,

it was unlawful to "knowingly solicit, offer, pay or receive any remuneration, including any kickback . . . directly or indirectly . . . in cash or in kind, in return for referring an individual to a person for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . ." § 409.920(2)(e), Fla. Stat. (2000) (emphasis added). The term "knowingly" meant "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." § 409.920(1)(d), Fla. Stat. (2000).

The issue presented in Harden and here is whether the Florida law is preempted because the federal law has a different mens rea standard. Harden also presents the question whether persons who receive remuneration for providing services for which payment is not made under Medicaid, i.e., providing patient referrals, fall within the federal employee safe harbor provision, 42 U.S.C. § 1320a-7b(b)(3)(B). That issue is presented here as a precaution, although, for the reasons explained, infra, it does not appear that the defendant, Mark K. Sachs, has claimed or could claim the employee safe harbor provision as a defense.

Should this Court reverse the decision of the Florida Supreme Court in Harden, it should also vacate that court's decision in this case and remand for further proceedings.

A. Proceedings Below

In August 2000, the State of Florida, through the Office of the Statewide Prosecutor, filed a three-count information charging Mark K. Sachs with racketeering, conspiracy to commit racketeering, and violations of the Florida Medicaid Fraud anti-kickback statute, § 409.920(2)(e), Fla. Stat.(2000). The predicate activity was violation of the Medicaid fraud statute. App. 6a-18a. The State alleged that between May 1 and November 6, 1997, the defendant, a Medicaid provider physician, was paid a total of $110,000.00 for prescriptions he referred to be filled by

other conspirators, which prescriptions were ultimately paid for by the Medicaid program. Id.

On May 6, 2004, the trial court granted the defendant's motion to dismiss. App. 4a-5a, 19a-20a. Its order was based solely upon the decision of the Third District Court of Appeal in State v. Harden, 873 So. 2d 352 (Fla. Dist. Ct. App. 2004), which held Florida's Medicaid anti-kickback statute, § 409.920(2)(e), Fla. Stat.(2000), unconstitutional. App. 4a-5a. On appeal, the Third District affirmed the trial court's dismissal, based on the parties' stipulation at the trial level as to the controlling effect of State v. Harden. App. 3a.

The Third District's decision in Harden had found § 409.920(2)(e), Fla. Stat. (2000), to be facially unconstitutional as preempted by the federal Medicaid anti-kickback provision, which contained "safe harbor" provisions and a "willful" mens rea requirement, neither of which appeared in the 2000 Florida Medicaid fraud statute.[1] Harden, 873 So. 2d at 355. The Florida Supreme Court affirmed the Third District's Harden decision, agreeing that Florida's anti-kickback statute was preempted by federal Medicaid law. State v. Harden, 938 So. 2d 480 (Fla. 2006). The State's petition for a writ of certiorari in Harden is still pending as of the filing of this petition.

Subsequently, in its review of the Third District's decision in Sachs, the Florida Supreme Court issued an order directing the State to show cause why the court should not summarily affirm Sachs in light of the decision in Harden. App. 1a. Although the State did not agree that Harden was correctly decided, it did agree that the decision was controlling and summary affirmance appropriate. Id. Thus, on the basis of its decision in Harden and the State's response to the order to show

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[1]Florida amended § 409.920(1)(d) in 2004 to add the word "willfully" and define the term "knowingly and willfully." That amendment, however, did not add an employee safe harbor.

cause, the Florida Supreme Court affirmed the Third District's affirmance of the trial court's order of dismissal. App. 1a-2a.

B. Statutory and Regulatory Background

Congress has required participating states to have a Medicaid fraud and abuse control unit as an element of a federally-approved Medicaid plan. See 42 U.S.C. § 1396a(61). The function expressly prescribed for such a unit is "the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State plan under this subchapter . . . ." 42 U.S.C. §§ 1396a(61), 1396b(q)(3) (emphasis added).

When Congress first enacted the federal Medicaid anti-kickback statute, the attendant committee report indicated that these provisions "would be in addition to and not in lieu of any other penalty provisions in state or federal law." H.R. Rep. No. 92-231, (1972), as reprinted in 1972 U.S.C.C.A.N. 5093, 5094 (emphasis added). Congress has repeatedly stated that the anti-kickback provisions were intended to address practices long considered unethical, that were unlawful in some jurisdictions, and that contributed appreciably to the cost of the Medicare and Medicaid programs. Id.; H.R. Rep. No. 95-393 (1977), as reprinted in 1977 U.S.C.C.A.N. 3039, 3052. Legislative history indicates that when the "knowingly and willfully" mens rea element was added to the statute, Congress intended to shield from criminal prosecution those individuals "whose conduct, while improper, was inadvertent." H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

In 1977 Congress included a safe harbor for payments made to employees in a bona fide employment relationship "for employment in the provision of covered items or services." See Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, § 4(b)(1), 91 Stat. 1175, 1180-81 (1977). In 1987

Congress required HHS to issue regulations establishing specific financial arrangements--"safe harbors"--that would not violate the anti-kickback statute. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 4, 14, 101 Stat. 680, 688-89, 697-98 (1987). The employee safe harbor regulation, 42 C.F.R. § 1001.952(i), tracks the statutory safe harbor language but clarifies that the item or service furnished must be one "for which payment may be made in whole or in part under . . . Medicaid."

HHS made clear that its proposed safe harbor regulations "would not provide immunity from civil or criminal prosecution or other sanctions under any other Federal or State laws. For example, a particular arrangement under a safe harbor . . . may run afoul of a State law that is applied by the State in a stricter fashion than the federal law." Medicare & Medicaid Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Proposed Rule, 54 Fed. Reg. 3088, 3089 (Jan. 23, 1989); see also Federal Health Care Programs: Fraud and Abuse; Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements, 64 Fed. Reg. 63504, 63506 (Nov. 19, 1999) ("Safe harbors do not apply to other laws, such as . . . State health care fraud laws."). When promulgating the final safe harbor regulations, 42 C.F.R. § 1001.952, the Office of Inspector General of HHS again stated that "conduct that is lawful under the federal anti-kickback statute or this regulation may still be illegal under State law." Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991).

REASONS FOR GRANTING THE WRIT

The allegations of the information filed in the trial court, App. 6a-18a, reflect serious violations of Florida's Medicaid fraud anti-kickback statute. Because this case was decided solely on the basis of the Florida Supreme Court's decision in Harden

without any elaboration of facts or defenses, it must be presumed that the lower courts addressed one or both of the questions presented in the pending Harden case.

The State of Florida asks the Court to hold this petition until such time as a ruling is made in State of Florida v. Harden, No. 06-770. Assuming the Florida Supreme Court's decision in Harden is reversed in whole or in part, the State of Florida asks that the decision of the Florida Supreme Court be vacated and this case remanded for further consideration in light of this Court's ruling.

The decision below and the Harden decision are wrong and certiorari should be granted for the following reasons.

1. The Federal Safe Harbor Statute and Regulations Apply Only Where An Employee Provides A Covered Service.

By their plain terms the federal safe harbor statute and the implementing HHS regulation shelter only those payments made to employees in the provision of "covered" items or services for which payment may be made in whole or in part under Medicaid. See 42 U.S.C. § 1320a-7b(b)(3)(B); 42 C.F.R. § 1001.952(i).

From the facts set forth in the information filed below, App. 6a-18a, it would not appear that respondent Sachs, a Medicaid provider physician, was employed or could have been employed by the pharmacy from which he accepted kickbacks, nor that he was providing any Medicaid-compensable service to the pharmacy. The only apparent "service" he provided in return for the remuneration was the referral of prescriptions.

The decision of the Florida Supreme Court in Harden wrongly decided that Florida's anti-kickback statute was preempted, and that a defendant was protected by the federal safe harbor regardless of whether he was providing a Medicaid-compensable service. Because it is not clear whether respondent Sachs was i) claiming protection under the federal employee safe

harbor, and ii) providing a Medicaid-compensable service in return for the remuneration, the decision below should be vacated and this case remanded.

2. The Florida Anti-Kickback Statute Should Not Have Been Held Preempted Because Of Different Mens Rea Language.

In its decision in Harden, the Florida Supreme Court held that § 409.920(2)(e) was preempted because the "should be aware" language in § 409.920(1)(d), Fla. Stat.(2000), permitted prosecution based on negligent conduct. Like the defendant in Harden, however, Sachs was not charged with negligent or inadvertent conduct. It would defy common sense to conclude that one could negligently receive $25,000 in cash, three $25,000 checks, and a $10,000 check in return for referring patients to the service provider paying the kickbacks. App. 8a-12a.

Congress' use of the word "willfully" in 42 U.S.C. § 1320a-7b(b)(2) was intended to shield only inadvertent conduct. App. 16a, 17a, 19a. See H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572. Congress could not have intended to protect kickback schemes involving the repeated payment and acceptance of fees for patient referrals, as in Harden, or, as here, for prescription referrals.

The decision below is wrong for the same reasons the Harden decision was wrong. First, Congress expressly authorized the states to enforce their own laws on fraud. See 42 U.S.C. § 1396b(q)(3). In preemption cases, this Court has interpreted explicit statutory provisions recognizing state authority "to mean what they say." Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 34 (1996). Therefore, even if there is a difference in the mens rea standard of the federal and state laws, it is irrelevant. Second, in this case, as in Harden, Florida is not prosecuting negligent or inadvertent conduct. The Florida Supreme Court erred in holding that the Supremacy Clause required the Florida anti-kickback statute to be preempted in its

entirety when only the "should be aware" language was problematic. It is well-established that in preemption cases a court "should not extend its invalidation of a statute further than necessary to dispose of the case before it." Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996)(quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

Third, even if § 1396b(q)(3) were disregarded, the "should be aware" language in Florida's definition of the term "knowingly" does not stand as an obstacle to the full purposes and objectives of Congress. Both criminalize the same intentional act--making referral payments. In these circumstances, where the payment and acceptance of kickbacks reflect intentional and even planned conduct, the difference between the federal and Florida mens rea standard is inconsequential. All Medicaid providers--be they physicians or pharmacists--should know that paying for patient or prescription referrals is unlawful. Here, Florida has not sought to prosecute negligent conduct, but conduct that every physician and pharmacist should know to be improper. Hence, the Florida mens rea standard cannot be held to frustrate Congress' purpose--combating Medicaid and Medicare fraud.

3. The Issues Presented In This Case Are Of Vital Importance To All State Medicaid Programs.

Congress gave the states a clear command--to prosecute "violations of all applicable State laws regarding any and all aspects of fraud" in connection with their Medicaid programs. 42 U.S.C. § 1396b(q)(3)(emphasis added). Fraud is endemic to the Medicaid program and it is vital that the states know how far their powers extend in this area. Congress has repeatedly characterized kickbacks as unethical and found they increase the costs of the Medicaid and Medicare programs. See Statement of the Case, supra, p. 5.

Applying the reasoning of the Harden decision, any state anti-kickback statute whose mens rea language is not identical to

the federal standard of "knowingly and willfully" would be facially preempted even when--as here--the state is not prosecuting negligent or inadvertent conduct. In addition, those state statutes lacking an employee safe harbor would also be preempted.

Whether the laws of a majority of states could be found preempted under the reasoning of Harden and the decision below is an important question that should be resolved now. Only three states use the federal mens rea term "knowingly and willfully," nine use only the word "knowingly," and nineteen states and the District of Columbia have no mens rea language at all. Others use such terms as "purposely," "intentionally," "knowingly or intentionally," and "intentionally or with reckless disregard." App. 27a-35a. Further, sixteen states and the District of Columbia have no statutory safe harbor provision like 42 U.S.C. § 1320a-7b(b)(3)(B). Id. Nineteen states do have such a provision. Id.

The states must know whether and to what extent their Medicaid fraud laws have been preempted. Only this Court can definitively decide this issue. State by state adjudication will only be wasteful and inconclusive.

CONCLUSION

For all the reasons set forth, the decision below should be vacated and this case remanded for further proceedings consistent with this Court's decision in State v. Harden, No. 06-770.

Respectfully submitted,

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